90-761

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN JUZWIN and MARY JUZWIN, his wife,
Petitioners,

vs.

ASBESTOS CORPORATION LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINTKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COUPT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution prohibit a state from withholding a statute of limitations defense from corporate defendants who have failed to appoint an agent for service of process where such appointment, according to state and federal courts, subjects the corporation to the general jurisdiction of the state courts?

2. If the Commerce Clause does prohibit such a tolling provision, should plaintiffs, who filed suit prior to the Court of Appeals' invalidation of the state statute be subjected to a statute of limitations defense?

LIST OF PARTIES

The parties to the proceedings in the courts below were as follows:

Stephen Juzwin and Mary Juzwin (plaintiff-appellee below);

Asbestos Corporation Ltd. (defendant below);

Carey Canadian Mines (defendant-appellant/third-party plaintiff below);

Amtorg Trading Corporation (defendant/third-party plaintiff below);

Metropolitan Life Insurance Company (defendant below);

Flintkote Mines Ltd. (defendant/third-party defendant below);

Turner & Newall, P.L.C. (defendant/third-party defendant below);

Leonard J. Buck, Inc. (appellee/third-party defendant/ fourth-party plaintiff below);

National Gypsum Company (third-party defendant below);

Lac D'Amiante du Quebec Limitee (third-party defendant below);

Bell Asbestos Mines Ltd. (third-party defendant below);

Associated Ore & Metal Corp., Ltd. (fourth-party defendant below);

Attorney General of New Jersey (plaintiff-intervenor below);

Wilentz, Goldman & Spitzer (Amicus Curiae below).

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STATEMENT OF THE CASE

This is a personal injury action in which petitioners, Mary and Stephen Juzwin allege that Stephen was exposed to

asbestos products or asbestos fiber supplied by the defendants, including Amtorg Trading Corporation.

Defendant, Amtorg, a New York corporation, accepted service at its New York office by certified mail and subsequently removed the case to federal court pursuant to 28 U.S.C. 1446. All of the defendants in this action are foreign corporate entities.

Petitioner admits to being diagnosed as having asbestosis in 1982 and failed to institute a law suit within two years thereafter. Discovery showed that in June, 1982 petitioner, represented by counsel, filed and litigated a Worker's Compensation claim. No lawsuit was timely filed by the petitioners.

Under the N.J.S.A. 2A:14-2, the New Jersey statute of limitations for personal injury actions the case was time-barred. However, the operation of N.J.S.A. 2A:14-22, the New Jersey tolling statute, prevented the running of the limitations period for foreign corporations not represented in New Jersey.

The district court denied Amtorg's motion for dismissal based on the time-bar and rejected their contention that the tolling statute imposed an impermissible burden on interstate commerce. However, they certified the question to the Court of Appeals for the Third Circuit.

The third circuit held that the New Jersey tolling statute was invalid as applied against foreign corporations and the question was controlled by this Court's recent decision in *Bendix Autolite Corp v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). The ruling given retroactive application.

Until *Juzwin* v. *Asbestos Corp., Ltd., et.al*, 900 F. 2d 686(1990), the law was in constant flux, repeatedly questioned and twice stricken as unconstitutional. Further, Amtorg, since 1984 has been involved in asbestos litigation with the present petitioner's counsel and Amtorg has always

accepted service of process by certified mail at its New York City office.

It is for these reasons, as discussed infra, that Amtorg submits that N.J.S.A. 2A:14-22 imposes an unconstitutional burden on interstate commerce such that the statute must be invalidated. If this Court finds that the statute is unconstitutional Amtorg submits that such a ruling must be applied to the parties at bar. Controlling precedent focuses inquiry on whether petitioner justifiably relied upon prior law. Petitioners here, can in no way be said to have justifiably relied on the statute's validity. It is therefore appropriate to apply a ruling of unconstitutionality retroactively.

I. THE LOWER COURT'S DETERMINATION THAT THE SAVING CONSTRUCTION GIVEN TO THE TOLLING STATUTE BY THE NEW JERSEY LEGISLATURE IS UNCONSTITUTIONAL HAS BEEN UPHELD BY THE NEW JERSEY COURTS.

The Third Circuit Court of Appeals in *Juzwin v. Asbestos Corporation, Ltd.*, 900 F. 2d 686 (1990), held that the New Jersey tolling statute is unconstitutional as applied by New Jersey against foreign corporations. The panel, basing its decision upon how the New Jersey Supreme Court would decide the issue, relied upon this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 100 L.Ed 2d 896 (1988) and determined that the New Jersey tolling statute, incorporating the legislative changes made in 1984, still constituted an impermissible burden on interstate commerce.

The third circuit court did not have the benefit of any binding precedents from the New Jersey state courts when it rendered the decision. However, since that decision was handed down, a New Jersey trial court opinion has been approved for publication and is now binding law in New Jersey, *Crespo v. Stapf*, W-028242-88 (March 21, 1990). In that case the Superior Court of New Jersey, Hudson County relied upon both *Bendix* and *Coons* v. *American Honda*

Motor Co., 94 N.J. 307 (1983) and declared the New Jersey tolling statute unconstitutional.

In *Crespo v. Stapf,* defendant, Joseph Stapf, a resident of Germany and owner of an unincorporated business, located in Germany, sought to dismiss plaintiff's product liability action on the grounds that New Jersey's tolling statute was unconstitutional against non-resident individuals. Judge Wefing stated that a "sensitive balancing between the state's legitimate interest in preserving New Jersey citizens' causes of action and any resultant burden which flows from the method selected" is required. *Crespo* at page 5. "Under the statute, the only method by which a nonresident individual may receive the protection of our statute of limitations is to become a resident of this state. *In dicta*, the New Jersey Supreme Court has indicated that an attempt to require a foreign corporation to obtain a certificate to do business to obtain the benefits of the statute of limitations would not survive a balancing analysis for commerce clause purposes", citing *Coons. Id.* at 6. A state "may not condition this exercise of the defense of the statute of limitations on the . . . relinquishment of rights that the foreign . . . (defendant) would otherwise retain," citing *Bendix.*" *Id.*

Petitioners have failed to call the *Crespo* case to the Court's attention, but rather, they argue that *Armenti v. Carey Canada, Inc.* Doc. No. AM-177-88-T3F (Nov. 4, 1988) an unpublished opinion, is controlling in New Jersey. N.J. Rule 1:36-3 in pertinent part states "[n]o unpublished opinion shall constitute precedent or be binding upon any court."

Armenti is an unpublished decision and as such is not binding law in New Jersey. Petitioner's reliance on *Armenti* in determining that the New Jersey court's construction of the tolling statute is in conflict with the lower court's holding is erroneous. The lower court and the state courts are in agreement that what petitioner calls "the saving construction" given to the tolling statute by the New Jersey state legislature

is invalid as applied and contrary to the Commerce Clause of the United States Constitution Art. I § 8.

II. THE LOWER COURT APPLIED THIS COURT'S PRECEDENTS IN DECIDING THE TOLLING STATUTE UNCONSTITUTIONAL AS APPLIED BY NEW JERSEY AGAINST FOREIGN CORPORATIONS.

In deciding *Juzwin* the lower court did not depart from this Court's analysis in *Bendix* in order to determine that the New Jersey tolling statute is unconstitutional as applied in this state. The court examined the tolling statute under both the heightened scrutiny standard as set out in *Ford Motor Co. v. Insurance Comm'r of Pa.*, 874 F2d 926, (3d Cir. 1989) and the balancing test enunciated in *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970). "While heightened scrutiny is the standard of review for simple economic protectionism, '[this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." "Because the New Jersey tolling statute applies to out-of-state corporations but not to New Jersey corporations, it comes within the class of statutes that are subject to heightened scrutiny.' " *Juzwin* v. *Asbestos Corp., Ltd.* at page 8.

The court determined that a more narrowly tailored statute could be effected by the state where a court might order the statute of limitations to be tolled when it is satisfied that, "in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mailservice." In that way, "the differentiation would be based on the inability to locate or reach, [a particular foreign defendant] not on the attribute of being foreign." See *Bendix* 486 U.S. at 898.

The lower court recognized the difficulty in drawing the line between a statute that "is virtually *per se* invalid and one

that must be analyzed under the balancing test" and found, as in *Bendix,* that the selection of the test "is not outcome-determinative, for even under the balancing test the statute cannot survive. *Juzwin* at 11. They stated that the real burden, "that foreign corporations unrepresented but possibly amenable to long-arm service must make the difficult choice whether to file designations (with uncertain consequences) or forego a potential limitations defense is 'grossly disproportionate to the state's interest in assisting resident plaintiffs in pursuit of claims against foreign corporations.' " *Id.* Therefore, "even with [the] limiting construction of N.J. Stat. Ann Sec. 2A:14-22, the tolling statute violated the commerce clause under either test since a nondiscriminatory procedure, less burdensome to interstate commerce, could be adopted by New Jersey" under the state long-arm statute N.J. Ct. R. 4:4-4(c)(1). *Id.* at 10.

In addition, plaintiffs in New Jersey can avail themselves of N.J. Ct. R. 4:26-4 providing in pertinent part: "If the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him." *Id.* at 9. This "John Doe complaint" permits New Jersey plaintiffs to toll the statute of limitations when they can not locate foreign corporate defendants. Petitioners are absolutely incorrect in asserting that the decision of the lower court was a misapplication of Supreme Court precedents.

Petitioners also argue that twelve other states have tolling statutes and the decision in *Juzwin* will have enormous consequences on what happens to those states. This Court was mindful of that when it rendered the decision in *Bendix* and therefore this contention is unrelated to the case at hand. *Juzwin* and *Crespo,* following the analysis in *Bendix,* deal exclusively with the unconstitutionality of New Jersey's tolling statute and its legislative limitations. These two cases are

in accord with each other and their interpretation is not confusing nor does it disagree with this Courts previous application of the commerce clause to state tolling statutes.

III. THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS HOLDING IS CONSISTENT WITH THIS COURT'S RETROACTIVITY GUIDELINES.

Certiorari on the issue of retroactivity should not be granted as the third circuit court's decision to grant retroactivity was based upon this Court's decision in *Chevron Oil Co. v. Huron,* 404 U.S. 97 (1971), was fact sensitive, and was not an abuse of discretion. Petitioner argues that the lower courts decision to apply the statute retroactively was based upon no finding of facts by the district court that petitioners should have foreseen the constitutional infirmities of the statute. To the contrary, the third circuit when it declared that the question must be decided according to *Chevron* standards "what is necessary, what is fair, and what is workable", citing *Lemon II.* 411 U.S. at 200, decided that plaintiff's reliance on the constitutionality of the New Jersey tolling statute was unreasonable.

Examining the law of New Jersey from the time plaintiff's cause of action arose until they filed their complaint five years later, the court determined that plaintiffs not only had notice that the tolling statute had been attacked and then struck down, *G.D. Searle & Co. v. Cohn,* 455 U.S. 404 (1982) followed by *Coons v. American Honda Motor Co.,* 463 A. 2d 921 (N.J. 1983) (*Coons I*), *on rehearing,* 476 A2d 763 (N.J. 1984) (*Coons II*), *Cert. denied.* 469 U.S. 1123 (1985), but in addition they were aware of the prospective and retroactive arguments that occurred after the New Jersey legislature attempted to correct the constitutional infirmity. See *Juzwin,* pagesx 17-19.

Plaintiffs did not attempt to file their complaint on any number of occasions although, "it was a foregone conclusion

that there would be a constitutional attack on the amended tolling statute." *Id.* at 19. "In cases where a definitive ruling is lacking on the appropriate limitations period plaintiffs can not justify delaying bringing suit." *Id.* at 19.

Petitioners are seeking a writ based upon their failure to timely file the complaint in this matter. This is not an adequate reason to grant certiorari, and is not the type of case the Supreme Court should hear on certiorari. Petitioners are unhappy with the third circuit's reading and analysis of *Bendix*. However, the only legal basis cited in their petitions is *Armenti* an unpublished and non-binding opinion. *Crespo v. Stapf,* approved for publication in June 1990, affirmed the unconstitutionality of the tolling statute and is controlling in New Jersey.

IV. THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI HAVE NOT BEEN MET PURSUANT TO SUPREME COURT RULES, RULE 17.

According to Supreme Court Rules, Rule 17, a writ of certiorari should not be granted to petitioners because no federal court of appeals has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by a lower court to call for an exercise of Supreme Court power of supervision. In addition, no state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals, nor has any state court or a federal court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or has decided a federal question in a way in conflict with applicable decision of the Supreme Court.

CONCLUSION

In conclusion the writ of certiorari should not be granted. Plaintiffs have failed to meet the criteria, and have cited no law to the Court which would indicate that the New Jersey courts would differ with the third circuit court's decision in this case.

Respectfully submitted
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